No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

v.

KENNETH DUANE ROY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Whether federal Due Process requires, on federal collateral review of state instructional errors related to an element of a criminal offense, that the prosecution meet a higher standard for harmlessness akin to that urged by the concurring opinion in *Carella v. California*, 491 U.S. 376, 105 L.Ed.2d 218, 109 S.Ct. 2419 (1989), rather than the "substantial and injurious effect" standard dictated by *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

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OPINION BELOW

Petitioners respectfully petition for a writ of certiorari to review the April 15, 1996, en banc decision of the United States Court of Appeals for the Ninth Circuit reversing, on collateral habeas review, a state court judgment and conviction of respondent Kenneth Duane Roy for first degree murder. The majority and dissenting opinions (App. A) are reported as *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996). The September 26, 1995, order granting respondent's petition for rehearing and suggestion for rehearing en banc (App. B) is reported at 66 F.3d 254. The reversed and superseded June 9, 1995, opinion of the three judge panel of the Ninth Circuit denying habeas relief (App. C) is reported at 55 F.3d. 1483. The May 10, 1994, order and opinion of the United Stated District Court Eastern District of California (App. D) and the March 5, 1993,

memorandum of Findings and Recommendations of the district court magistrate judge (App. E) are unreported. The state Supreme Court's November 21, 1988, denial of respondent's petition for state habeas review (App. F) also is not reported. The state Court of Appeal remittitur of May 9, 1989 (App. G) is not reported nor are the state Supreme Court order of May 4, 1989, denying petitioners' and respondent's petitions for review and denying depublication (App. H) and the state Court of Appeal February 22, 1989, order denying rehearing (App. I). The majority and dissenting opinions of the California Court of Appeal, Third Appellate District, Case No. C000992 (App. J) are reported in part as *People v. Roy*, 207 Cal.App.3d 642, 255 Cal.Rptr. 214 (1989).

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its en banc judgment on April 15, 1996. App. A. The Ninth Circuit has issued a stay of mandate to June 21, 1996. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1), and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution (App. K); article VI, section 13 of the California Constitution (App. L); California Penal Code sections 31, 187, 189, 211, 190.2(a)(3) and (a)(17)(i), and 12022(b) (App. M); California Jury Instructions -

Criminal (CALJIC), as given at respondent's trial, Nos. 2.01 (1979), 2.02 (1979), 3.00 (amended by 4.25), 3.01 (1980), 3.31 (1980), 3.34 (1979), 3.35, 5.30, 8.21, 8.27 (1979), 8.77 (1979), 8.79, 8.80 (1981), 8.81.17 (1980), 8.83, 8.83.1, 901, 17.16 (1977) and 17.45 (App. N).

STATEMENT OF THE CASE

Following affirmance by the California courts of review of his 1983 convictions by jury trial in *People v. Roy*, Butte County Superior Court, Case No. 76386, for aiding and abetting his companion, Jesse McHargue, in the robbery-felony murder and robbery of Arch Mannix and for second degree murder for respondent's actual killing of James Clark with a knife,[1] respondent sought

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1. The jury acquitted respondent of robbing Clark. The jury also found true a robbery-felony murder special circumstance which mandated imposition of a life without parole sentence, but this finding was reversed by the state Court of Appeal (App. J) on direct appeal because it found the instructions "fused guilt and penalty theories" such that the instructions as a whole "plac[ed] the relationship of the robbery to the killing in the identical posture for purposes of culpability, under a felony murder theory, and penalty as a special circumstance." App. J at 14. Petitioners' state petition for review of that part of the decision was denied. App. H. The state Court of Appeal also affirmed in a split decision the underlying first degree felony murder and second degree murder convictions after applying the *Chapman* harmless error test. *See Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct 824 (1967) ("*Chapman*"). Respondent's petition for review of that holding was denied. App. H. Reversal of the special circumstance finding required remand for resentencing, and respondent received a minimum state prison term of 46 years as follows: five years for robbery of Mannix plus one year for being armed with a knife in that robbery plus fifteen years to life for the second degree murder of Clark plus twenty-five years to life for the first degree murder of Mannix. App. O. It is respondent's confinement pursuant to his

a writ of habeas corpus in the United States District Court, Eastern District of California, pursuant to Title 28 of the United States Code, section 2254. Challenging only his first degree, robbery-felony murder conviction for killing Mannix and the underlying robbery, respondent claimed the state court erred in finding instructional error under *People v. Beeman*, 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984)[2] harmless beyond a reasonable doubt and concluding that respondent had not been deprived of due process and a fair trial. Under *Beeman*, a case decided after respondent's convictions, aiding and abetting instructions are inadequate unless the instructions inform the jury that the offense of aiding and abetting requires an intent to facilitate the criminal offense aided. *Beeman* at 560. The jury here was not so instructed. Thus, error occurred under the due process clause of the United States Constitution. *See* App. K and *Carella v. California*, 491 U.S. 376, 105 L.Ed.2d 218, 109 S.Ct. 2049 (1989) ("*Carella*").

However, the jurors were instructed that to convict they must find respondent was liable for the natural and probable consequences of acts he knowingly aided or encouraged, that he acted with knowledge of McHargue's unlawful purpose (i.e., robbery); that, if it found first degree murder, it must also determine whether it was committed during a robbery and that the robbery was not merely incidental to the commission of

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conviction for the Mannix murder and robbery that is at issue in this case.

2. *Beeman* subsequently was criticized by *People v. Dyer*, 45 Cal.3d 26, 246 Cal.Rptr 209, 753 P.2d 1 (1988), *cert. den. sub nom. Dyer v. California*, 488 U.S. 934, 102 L.Ed.2d 347, 109 S.Ct. 330, which held that *Beeman* error is not reversible per se, but on direct appeal is subject to a *Chapman* beyond-a-reasonable-doubt harmless error analysis. See *Chapman* at 24.

the murder.[3] *See* App. N, CALJIC Nos. 3.00 as amended by No. 4.25, 3.01, 8.27 (1979), 8.80 (1981), 8.81.17 (1980) as given by the trial court and to the jury in writing. *See also*, App. J at 11-14. Petitioners contend that these instructions, the evidence before the jury and the jury's factual findings rendered this error harmless.

Respondent has contended in federal court, as he did throughout the state appellate proceedings, *see, e.g.,* respondent's state habeas petition, paras. 10(a) and 10(b), that the *Beeman* error was not harmless because it deprived him of the right to jury trial and a finding on proof beyond a reasonable doubt as to the intent element of aiding and abetting. The magistrate judge recommended denial of the writ, finding the error harmless. App. E. The district court judge agreed and denied the writ. App. D. In a two to one decision a three judge panel of the Ninth Circuit also agreed and found the error harmless. App. C. The Ninth Circuit

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3. Significantly, the jury was also instructed that to find the robbery-felony murder special circumstance allegation true, as it did, *see* n. 1, *ante* p. 3, it must find beyond a reasonable doubt that respondent "intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer. . . ." App. N, CALJIC No. 8.80; CT 875-76. The Court of Appeal reversed the special circumstance because it decided that a hyper-technical reading of the language of the felony-murder special circumstance instruction taken in context with the instructions as a whole "fused" the guilt and death-eligibility theories such that the jury could have found respondent intentionally aided a robbery but did not intend the killing that occurred during its commission. Intentional killing is required for a special circumstance finding, but not for an aiding and abetting a first degree felony-murder finding. For the latter, the only intent requirement is the intent to aid the underlying robbery offense. *Beeman* at 560, 561. *See also*, App. J, Court of Appeal opinion at 16, 18-19, 21-22, 25-26, 34; App. C, three judge panel opinion at 9, n. 2.

then granted respondent's request for rehearing and suggestion for rehearing en banc. Apps. C, B. On April 15, 1996, in another split decision (eight to three), the majority opinion of the en banc panel reversed the district court, relying on its own hybrid standard of review culled from three opinions of this Court. First the majority found that, were the case before it on direct review, the error would not be harmless beyond a reasonable doubt under the factors considered in the concurring opinion of Justice Scalia in *Carella*. Therefore, the majority concluded that, under what it described as the "stricter standard for harmless error in habeas cases" mandated by *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993) ("*Brecht*"), it could not be certain the jury found the "misdescribed" element of intent. Accordingly, the majority held that "a conscientious[4] judge can only be 'in grave doubt as to the harmlessness of the error' *O'Neal*, 115 S.Ct at 995[5], and relief must be granted." Thus, the majority effectively reversed respondent's conviction of the first degree murder and the robbery of Mannix. His conviction for second degree murder of Clark remains intact. App. A at 7.

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4. The majority's lifting of this one phrase from *O'Neal* is curious given that all of the state Supreme Court judges, two of the state Court of Appeal judges, the federal magistrate judge, the district court judge, two of the Ninth Circuit three judge panel members and three of the en banc panel members found the *Beeman* error harmless. One would think that the majority would at least credit each of these judges as having been "conscientious" in their decisions. Also of note, the opinion of the three judge panel was penned by an Eighth Circuit judge sitting by designation. Thus, this case itself essentially reflects the split among the circuits. *See* App. B at 4.

5. *O'Neal v. McAninch*, ___ U.S. ___, 130 L.Ed.2d 947, 115 S.Ct 992 (1995) ("*O'Neal*").

Based on the jury findings, the killing of Mannix occurred right after respondent by his own admission had stabbed Clark to death, and both deaths occurred during two virtually contemporaneous robberies. *See* App. A at 21-22 (dis. opn., Wallace, Cir. J.) The record discloses that on the night of September 13, 1981, respondent, his companion, McHargue, and the two victims, Clark and Mannix, were out driving together in Mannix's truck. Sometime just before 11:15 p.m., a passerby, Maria Smart, saw the truck straddling a ditch. RT 2050, 2564. She asked two men standing by the truck if they needed help. RT 2469. One man, later identified as McHargue, said no they had made a call and pointed down the road. RT 2473, 2482. As Mrs. Smart left in her car, she saw a shirtless man, who appeared to be hurt, lying on the ground moving only his hands. As she drove away, the two other men were standing over him. RT 2469-76.

Sometime later, law enforcement officers spotted the truck at the same place; one of them recognized the truck as belonging to Mannix. RT 2051, 5054-58. It was in the ditch about five and a half feet above water that was twelve inches deep in the ditch. The body of Clark was lying on the other side of the ditch. RT 2057, 2626, 2057-58. It was wet and muddy and had a puncture wound in mid-chest with a small pool of blood. RT 2058. Clark died from a single stab wound through the heart. His jean's pocket had been turned inside out and there was a large amount of dirt on his face and various body surfaces. RT 2690, 2693-94.

Another body, that of Mannix, was under the truck and was submerged in the water. He was shirtless, his pants had been pulled down to his knees, and his wallet and papers were spread on the ground at the rear of the truck. RT 2063-64, RT 2390, 2669. The wallet was empty although Mannix had had a large amount of

cash just the week before. RT 2207, 2637. Mannix had been stabbed in the heart and abdomen and had been drowned; either act could have killed him. RT 2698-01. Post-mortem stab wounds were inflicted above and on his left hip. RT 2711-12. The wounds were consistent with those made by a buck knife. RT 2725. Both victims had a high blood alcohol level (.19 percent for Mannix and .27 percent for Clark). RT 2819.

About 3 o'clock the next morning, investigating officers found respondent and McHargue at a restaurant where they had been for two hours. RT 2069-72, 2668-69. Each of them carried a buck knife. RT 2072-73, 2139. Respondent's pants were wet up to the calf. RT 2285-86. His backpack was wet and muddy, and Mannix's moccasins and vest, both soaking wet, were found inside it. RT 2275, 2424, 2452, 2662. McHargue's backpack was also very wet, his hands were muddy, and his pants were completely wet. RT 2448-49, 2450. After respondent's arrest, Mannix's watch and key ring with keys were found among respondent's belongings, and he had a blue wallet with $170.53 in it. RT 2314, 2318-19, 2326, 2666.

Roy admitted he stabbed Clark and claimed Clark had started hassling him. RT 2182-83. As to victim Mannix, respondent gave several stories. He told arresting officers that, after stabbing Clark, he turned around and Mannix was already in the ditch and that he (respondent) walked away. RT 2183-84. While in jail prior to trial, respondent told inmate William Hudspeth that, after he and McHargue met Mannix and another man (Clark), they planned to rob them, take the truck, and "to take them out," meaning kill them. RT 3118, 3120, 3123-24. He related how McHargue had trouble with Mannix so he, respondent, pulled Mannix off McHargue and stabbed him in the lower part of the body and then pushed Mannix's head under water to

make sure he was dead. RT 3127. He admitted taking the victims' money and clothing. RT 3128-29. Respondent also told Hudspeth he intended to plead self-defense and claim that he and McHargue had been robbed. RT 3131.

Respondent told another jail inmate, Sidney Hall, that he stabbed Clark after Clark had hit him with a stick. RT 3200-01. He again admitted that he helped McHargue hold Mannix under water, RT 3203-04, but later retracted the drowning part of his story. RT 3204. Respondent told Hall that a woman had driven by and stopped at the crime scene. RT 3219.

At trial respondent did not testify; but, by relying on statements made to investigating officers, he claimed self-defense in the killing of Clark and denied killing Mannix. Respondent also argued that mental impairment from alcohol, lack of intelligence and deficiency or disease caused him to reasonably believe in the need for self defense and called two experts, trying to establish his mental limitations. CT 5708, 5710, 5715, 5717-19. Both experts opined that respondent had some brain dysfunction. One opined that he lacked the capacity "to form a clear and deliberate intent to kill a human being" and did not have the capacity to harbor implied malice. RT 3577-78, 3641, 4282-83. The other acknowledged that nothing in the test results indicated that respondent could not form an intent to kill. RT 3657. The prosecution presented evidence contesting the defense experts' findings. RT 4426-27.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit majority en banc opinion, as the dissent in this case points out (App. A at 20-21), conflicts with

decisions of the First and Seventh Circuits, *see Libby v. Duvall*, 19 F.3d 733 (1st Cir. 1994) and *Cuevas v. Washington*, 36 F.3d 612, 620, & n. 17 (7th Cir. 1994). Other circuit court opinions and California state court opinions conflict as well, as is more fully discussed below.

Furthermore, the majority opinion is patently wrong; and, by wrongly interpreting the *Brecht* standard of harmless error in tandem with the concurring opinion in *Carella*, the opinion grafts onto the *Brecht* standard the beyond a reasonable doubt standard applicable only to direct review cases. The Ninth Circuit's error will have a significant impact if certiorari is not granted. Rather than settling the conflict on whether a harmless error review is proper and, if so, what standard of prejudice is to be applied on federal collateral review in cases involving state instructional error related to an element of a criminal offense, this case confuses the issue further and will do nothing to abate the proliferation of conflicting decisions in the Ninth circuit or any other court. Accordingly, the need for certiorari is acute.

ARGUMENT

I.

THE MAJORITY OPINION IMPROPERLY GRAFTS THE *CARELLA* STANDARD ON TO THE *BRECHT* STANDARD FOR HARMLESS ERROR REVIEW, CONFLICTS WITH OPINIONS FROM THE FIRST AND SEVENTH CIRCUITS AND, THUS, AGGRAVATES THE SPLIT IN CIRCUIT OPINIONS

A series of cases from this Court has established the standard for evaluating prejudice on federal habeas collateral review of state court error, among them *Brecht* and *O'Neal*. However, the circuit and district courts in split decisions are disputing whether or not and how *Brecht*[6] and *O'Neal* should govern evaluation of jury instruction errors related to an elements of a criminal offense. The instant case well demonstrates the confusion in lower courts because the state Court of Appeal, the three judge circuit panel and the en banc circuit panel all rendered split decisions on this very issue. Some circuit court opinions, like the Ninth Circuit majority opinion in this case, have grafted onto the *Brecht* federal habeas harmless error standard the narrower method for determining prejudice on direct review of federal cases defined by Justice Scalia in his

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6. *Brecht* found harmless the improper use of an accused post-*Miranda* silence for impeachment. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct 1602 (1966). *O'Neal* dealt with the effect of "possible jury 'confusion' arising out of a trial court instruction about the state of mind necessary for conviction combined with a related statement by a prosecutor." *Brecht* at 622-23; *O'Neal* at 994.

concurring opinion in *Carella*. Thus, what is evolving in the circuit and district courts is a higher, hybrid-standard for a finding of harmlessness for instructional error on collateral review. This is in direct contradiction of this Court's mandates in *Brecht* and *O'Neal*.

As the dissenting judge noted upon the Seventh Circuit's reversal of a grant of habeas relief in *Cuevas v. Washington*: This "approach may well result in a determination of harmless error in substantially fewer instances than the usual 'trial error' situation." *Id.* at 624 (dis. opn., Ripple, Cir. J.). Such an increase in overturning state convictions on collateral review clearly opposes this Court's intent as stated in *Brecht* at 637.

For example, in *Libby v. Duvall*, 19 F.3d 753, the lead, concurring and dissenting opinions of a divided three judge panel of the First Circuit urged three different standards for evaluating the prejudicial effect of instructional error. The case exemplifies why review by this Court is necessary.

Having determined that the overall jury charge did not adequately explain the element of malice, the lead opinion determined the error harmless under *Brecht* and rejected the habeas applicant's claim that the *Carella* concurrence method of analyzing harmless error should be applied. The lead opinion conceded that there was evidence upon which the jury "*might* conceivably have" provided a basis for the jury to have concluded the prosecution had not proven its case and that the instructional error (a conclusive presumption) tended to deter the jury from considering that evidence. Nevertheless, it found, after a review of the record evidence, that it was "extremely unlikely that the jury would have relied on the evidence and returned a verdict of manslaughter." *Libby* at 740. Thus it found the error did not have "substantial and injurious effect or influence on the jury's verdict" and found it harmless. *Id.* A

concurring judge affirmed under *Brecht*, but shared the dissenting justice's belief that the "*Carella* concurrence articulates compelling grounds for more narrowly confining 'harmless error' review of a jury instruction mandating a conclusive presumption." *Libby* at 740 (conc. opn., Cyr, Cir. J.). The dissenting judge found the conclusive presumption instruction to be prejudicial under the *Carella* framework for determining harmlessness of the instructional error because the jury was "at least reasonably likely" to have improperly found malice. *Libby* at 743, 744 (dis. opn., Stahl, Cir. J.). The approach of the en banc majority in this case was essentially that of the *Libby* dissent.

In a split decision in *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994), the majority of the three judge panel, in analyzing instructional error described as an explicit misdirection of the jury, opined, as did the dissent in this case, that the error was harmless under *Brecht*. *Rosa* at 631-32. However, the dissent, like the en banc majority in the instant case, found that "allowing the approach urged by Justice Scalia in *Carella* to survive *Brecht* is compatible with the principle of judicial restraint and federalism re-emphasized in that opinion." *Rosa* at 637-38 (dis. opn., Ripple, Cir. J.).

Another majority of a three judge panel of the Seventh Circuit found, like the dissent in this case, that the *Brecht* test for harmless error requires a habeas court to evaluate to some extent the probability of outcome if the case were tried under proper instructions. *See Cuevas v. Washington*, 36 F.3d at 621. However, the dissenting opinion in *Cuevas* labeled instructional error a hybrid somewhere between "structural" and "trial" error, *see Arizona v. Fulminante*, 499 U.S. 279, 307, 113 L.Ed. 2d 302, 111 S.Ct 1246 (1991), and argued that the beyond-a-reasonable-doubt approach of *Carella* survives *Brecht* and is the appropriate method of determining

harmlessness on federal habeas review of a state court judgment. *Cuevas* at 625 (dis. opn., Ripple, Cir. J.). This is the approach taken by the Ninth Circuit en banc majority in this case.

The confusion of the foregoing cases is reflected in cases from other circuits and on direct appeal as well. *See Peck v. United States*, 73 F.3d 1220, 1228 (2d Cir. 1995) (reversal required unless the jury actually found knowledge element despite the failure to instruct that knowledge of illegality of structuring accounts is required for intent finding). *See also United States v. Marder*, 48 F.3d 564, 573 (1st Cir. 1995) (noting two different modes of harmless error analysis exist in the circuit courts where a jury instruction misdefines or omits and element of an offense); *Kontakis v. Beyer*, 19 F.3d 110, 117-118 (3d Cir. 1994), rehg. en banc, denied (1994), *cert. den. sub nom. Kontakis v. Morton*, ___ U.S. ___, 130 L.Ed.2d 143, 115 S.Ct. 215 (1994) (no harm under *Brecht* because of the overwhelming evidence that shooting was a purposeful act even given possibility the jury instruction may have kept the jury from considering mental disease and defect evidence).

The same confusion exists in the California state courts. *Compare People v. Harris*, 9 Cal.4th 407, 37 Cal.Rptr.2d 200, 886 P.2d 1193 (1994) (improper instruction on "immediate presence" element of robbery harmless beyond a reasonable doubt) with *People v. Kobrin*, 11 Cal.4th 416, 45 Cal.Rptr.2d 895, 903 P.2d 1027 (1995) (*dicta* suggests reversible per se standard applies to improper instruction to consider perjurious statements material). *Contra*, *United States v. Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (directed finding on materiality of making false statements is "trial error" subject to harmless error analysis). The Court should grant certiorari to review these important conflicts in

applying *Brecht* and resolve the confusion among the circuit and state courts of review.

II.

THE MAJORITY EN BANC OPINION OF THE COURT OF APPEALS IS WRONG

Furthermore, certiorari should be granted because the majority opinion of the en banc panel is patently wrong. Although the opinion correctly concludes that instructional error is trial error[7], it applies an improper standard in finding that error not harmless. In *Brecht*, this Court established that a less onerous standard applies to trial errors upon federal collateral review. *Id.* at 637-38. Thus, only if a state court error "had substantial and injurious effect or influence in determining the jury's verdict," will a federal court be justified in overturning the state court judgment. *Id.* In *Duncan v. Henry*, this Court described the *Brecht* standard as "somewhat similar" to the *Watson*[8] standard used by California courts. *Duncan v. Henry*, ___ U.S. ___, ___, 130 L.Ed.2d 865, 868, 115 S.Ct 887, 888 (1995); *see also*, *id.* at 890 and n.1, last two paragraphs (dis. opn., Stevens, J.). Therefore, where it can be

7. *See Arizona v. Fulminante*, 499 U.S. at 306, and cases cited therein ("trial error"--error which occurs during the presentation of the case to the jury--includes errors arising from infirm jury instructions). *See*, e.g., *O'Neal* at 995 (confusing instruction on state of mind necessary for conviction subject to harmless error test). *But see*, *Cuevas v. Washington*, 36 F.3d at 625 (dis. opn., Ripple, Cir. J.) (instructional error is a hybrid between "structural" and "trial" error); *People v. Kobrin*, 11 Cal.4th at 428 & n.8 (leaving open the question whether instructional error omitting an element of the crime could be harmless error, but strongly suggesting that it cannot be).

8. *People v. Watson*, 46 Cal.2d 818, 836 (1956), held that under the California Constitution, the harmlessness of trial error is measured by a more-probable-than-not standard. *See* App. L; Cal. Const., art. VI, § 13 (misdirection of the jury reversible only upon a "miscarriage of justice").

determined that, absent the error complained of, it is not "reasonably probable" that the defendant would have been acquitted, the error cannot have "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* Finally, in *O'Neal* the Court clarified that if, after "'pondering all that happened,'" a reviewing court finds the error itself had substantial influence or if one is left in doubt, the conviction cannot stand. *O'Neal* at 995, citing *Kotteakos v. United States*, 328 U.S. 750, 764-65, 90 L.Ed 1557, 1566-67, 66 S.Ct 1239, 1248 (1946). The "risk of doubt" is on the state.[9] *O'Neal* at 998. That means that in the narrow circumstance where in the mind of the reviewing judge, "the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error," it should grant relief. *O'Neal* at 994, 999. However, barring that circumstance of "virtual equipoise," it remains that federal habeas relief must be denied where it is reasonably probably that the state court error did not affect the result. *Duncan v. Henry*, 113 S.Ct at 888; *Brecht* at 637-638.

The above principles are simply stated and lend themselves to simple application. Conversely, the majority's opinion conflates these principles such that its application of them is so complex as to defy comprehensible explanation, let alone consistent application. Nevertheless, it is necessary to attempt to explain the decision in order to highlight its fallacies.

As the dissent states, "[t]he majority pays lip-service to the exclusive, less onerous, standard that the

9. This Court chose this terminology rather than "burden of proof" because, as this Court explained, the issue on review is not one of shifting of burdens based on evidence as is the case in the trial court, but it is one of determining whether or not the error itself was "likely" to have been harmful. *O'Neal* at 998.

Court in *Brecht* said we should apply to trial errors when our review is collateral. [However,] the majority erroneously looks to the *Carella* concurrence for the standard of review in habeas corpus cases, and . . . its error is compounded by its misapplication of *Brecht* and [*O'Neal*] . . .." App. A at 17. Although the majority correctly states, and the dissent agrees, that on collateral review the *Brecht* standard supplants the *Chapman* beyond a reasonable doubt standard, the majority rationalizes around the *Brecht* decision. App. A at 15, 17. The majority incorrectly states that the *O'Neal* decision, rather than clarifying that the risk of doubt in close cases is with the prosecution, established an *alternative* standard to that of *Brecht* for relief on collateral review. App. A at 15. ("[R]elief is *also* appropriate if the record . . . leaves the judge in 'grave doubt' . . .." Italics added.)

With this interpretation of *O'Neal* in mind, the majority performed its own beyond a reasonable doubt analysis following guidelines described in the *Carella* concurrence, a case addressing the beyond a reasonable doubt standard for direct review of instructional error. According to the majority opinion in this case, under the *Carella* concurrence guidelines instructional error can be harmless only where the jury "necessarily found" the facts which support the conviction. *Carella* at 271. The majority then holds that "[w]hen the reviewing court is unable to conclude the jury necessarily found an element that was omitted from the instruction, it is unable to gauge the effect of the error on the jury's verdict." App. A at 15-16. Then having circumvented the *Brecht* analysis altogether, the majority concluded that, under the *O'Neal* test, where it is possible, or not beyond a reasonable doubt, that the jury "could have found" different facts or may not have "necessarily found" all the facts as *Carella* dictates, "'a conscientious judge can only

be 'in grave doubt as to the harmlessness of the error,' . . .., and relief must be granted." App. A at 15, 16 citing *O'Neal* at 995.

By thus following its own enigmatic line of reasoning, rather than straightforwardly applying the simple principles of this Court's controlling decisions, the majority essentially holds that whenever *Beeman* instructional error occurs, it is reversible per se.[10/] At the very least, the "majority holds that in every case involving a jury instruction not satisfying the *Carella* concurrence, 'in the judge's mind, the matter is [must be, will be] so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.'" App. A at 20, citing *O'Neal* at 994. That is simply not the standard for collateral review.

Here, there can be no doubt, certainly no "grave doubt," that had the omitted *Beeman* clause been given (i.e., an instruction that, in addition to acting to aid Mannix with knowledge of Mannix's purpose of robbery, respondent acted with the intent to aid in the robbery), the jury would have rendered the same verdicts. The jury found the killing of Mannix was committed to carry out or advance a robbery or to facilitate escape or avoid detection. *See* App. N, CALJIC No. 8.81.17 (1991 rev.), CT 878. This is evidenced by the jury's true finding on the robbery-felony murder special circumstance allegation. *See* App. O, CALJIC Nos. 8.80, 8.81.17; CT 875-76, 878. The jury also found that respondent aided Mannix while Mannix was committing the robbery with

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10. As the dissent explains, the majority holds "that whenever a jury instruction contains an element that has been misdescribed or omitted and the jury did not actually find the facts supporting the missing element, a judge can never know whether the error had a 'substantial and injurious effect or influence in determining the jury's verdict' as required by *Brecht* . . .." App. A at 17.

knowledge of his (McHargue's) unlawful purpose and that respondent's aid amounted to more than mere presence at the scene and mere knowledge the crime was being committed. *See* App. N, CALJIC No. 3.01; CT 826.

Furthermore, although the CALJIC No. 3.01 instruction here lacked the *Beeman* clause, it has long been recognized by California courts that its absence does not entirely remove the question of mental state under California's aiding and abetting law from the jury's consideration. *People v. Dyer*, 45 Cal.3d at 61. The parties still will recognize that mental state is at issue and have an imperative to put before the jury any evidence that the defendant acted without the requisite intent. *Id.* Thus, the record as made in cases of *Beeman* error can be assumed to be no different than the record would have been had the missing instruction been given. *Dyer* at 61. So it is in this case, and respondent never has contended otherwise.

In addition, as applied to the facts in a particular case, even without the *Beeman* clause, the aiding and abetting instruction may convey to the jury the intent required because in the circumstances of the case, as in the instant case, the instruction (CALJIC No. 3.01 as given here) contains a legally adequate criterion of intent under the California law of aiding and abetting. App. J at 39, Court of Appeal Opinion.

As noted in petitioners' "STATEMENT," *ante* pp. 8-9, respondent presented expert evidence that mental deficiency prevented him from forming the intent to kill and argued that, given his mental limitations and intoxication, he acted in a reasonable belief of a need for self defense in killing Clark. The only evidence to support his theories, apart from expert opinion, was testimony about conflicting hearsay stories respondent gave to the police and two fellow inmates about his

participation in the crimes. The jury found respondent guilty of the second degree murder of Clark[11], guilty of the robbery of Mannix, and guilty of the felony-robbery murder of Mannix, despite his claims of self-defense, mental deficiency, and inability to form intent. Thus, the jury clearly rejected these defenses.

In summary, the jury did not believe that respondent acted in self-defense, did believe he had the capacity to form intent, and did believe that he knowingly and purposefully aided McHargue in the robbery of Mannix and so found beyond a reasonable doubt. "No rational juror could find that [respondent] aided McHargue, knowing what McHargue's purpose was, without also finding that [respondent] intended to aid McHargue in his purpose." App. D at 9, District Court Opinion; App. C at 9, *Roy v. Gomez*, 55 F.3d 1483; App. J.

The en banc majority opined, however, that the jury could have, if properly instructed, found that respondent knowingly and purposefully aided McHargue, not because he intended to assist him in the robbery, but merely to help McHargue defend himself against the victim Mannix. App. A at 13. However, this argument was never advanced by the defense. *See* CT 5666 et seq., closing argument. Moreover, the jury was not instructed on defense of a third person (Mannix) or on "just helping" Mannix as a defense theory.

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11. To find second degree murder under California law, the jury had to find that Clark's murder was an "unlawful killing of a human being as the direct causal result of an act involving a high degree of probability that it will result in death, which act is done *for a base, antisocial purpose* and with wanton disregard for human life by which is meant an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbiden [sic] act despite that awareness." CT 855, CALJIC No. 8.31 as given, italics added.

In support of its hypothetical, possible jury finding, the majority relies on testimony of two inmates, who related what respondent had told them about the killings, and claims their testimony indicates that respondent "realized McHargue was 'getting the worst of it' in his fight with Mannix, and went to McHargue's assistance. . . . to prevent Mannix from defeating McHargue." App. A at 13. However, in the same conversations, respondent told one of these inmates that he and Mannix had planned to rob and kill the victims (RT 3118, 3120, 3123-24), that McHargue had trouble with Mannix so he (respondent) helped him by stabbing Mannix and pushing his head under water and that he then took Mannix's money and clothing. RT 3128-29. Respondent also told the other inmate that he stabbed Clark after Clark hit him with a stick; and, although he later retracted it, respondent also told this inmate that he helped McHargue hold Mannix under water. (RT 3200-04.) Respondent had earlier told officers he walked away before Mannix was killed. RT 2182-84.

Thus, in order to make the hypothetical finding concocted by the majority, the jury would have had to disbelieve all the other testimony of these inmates, focused on minor hearsay testimony, and, unassisted by any instruction or defense argument, come up with the theory that respondent was merely "helping" McHargue defend himself irrespective of any contradictions or conflicting evidence and inferences.

In sum, given the evidence, "there is not even a reasonable probability that [respondent] did not assist McHargue with the intent to further the robbery of Mannix." App. C at 22. Most assuredly, given the evidence, the instructions actually given, the defense arguments, the recognition that mental state was in issue and presentation of all the evidence on that point, and the notable intent actually and ordinarily conveyed when

one acts to aid a perpetrator knowing his criminal purpose; the omission of the *Beeman* clause from the aiding and abetting instruction could not have had a "substantial and injurious effect or influence in determining the jury's verdict." Therefore, the Ninth Circuit en banc majority acted improvidently in granting respondent habeas relief. *Cf. Kontakis v. Beyer*, 19 F.3d at 117-118; *People v. Harris*, 9 Cal.4th at 428-30; *People v. Dyer*, 45 Cal.3d at 63-65. This Court should grant certiorari to correct the Ninth Circuit's error.

III.

THE QUESTION PRESENTED IS IMPORTANT

This case, as well as the federal circuit and state cases cited (see Arg. I, *ante* pp. 11-13) demonstrate the difficulty some courts and some judges have in accepting the less onerous *Brecht* standard for harmless error on collateral review. Given the trend for some to attempt to circumvent that standard as shown by these cases, the confusion will only proliferate.

The need for guidance from this Court is acute, and this case presents in a pristine form a timely and rare opportunity for this Court to address misconceptions about how the rule in *Brecht* is to be applied to instructional error on collateral review; whether *Brecht* replaces on such review the beyond-a-reasonable-doubt guidelines delineated by the concurrence in *Carella* or whether *Carella* circumscribes or supplements the *Brecht* standard; how the circuits, mainly the Ninth Circuit, compound the confusion about the *Carella* standard by misapplying it; and how *O'Neal* modifies either or both of these standards, if at all. The majority opinion in the case at hand is erroneous and contradicts the majority opinions of the state Court of Appeal and the lower federal courts, which reviewed the record and found the error harmless. The issue addressed is undoubtedly important for it impacts every federal collateral review of error in criminal jury trial instructions, especially instructions related to the elements of a criminal offense.

CONCLUSION

An irreconcilable conflict exists among the federal and district courts, and some state courts as well, on a fundamental issue of federal law impacting virtually every criminal jury trial in the United States. This case presents the perfect instrument for resolving these conflicts. For all the reasons discussed above, petitioners respectfully urge that this Court grant certiorari and resolve the important issues of law presented herein.

Dated: June 13, 1996.

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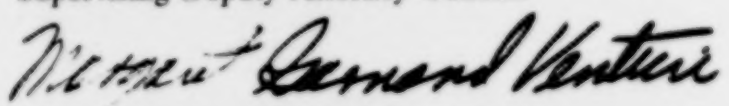

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